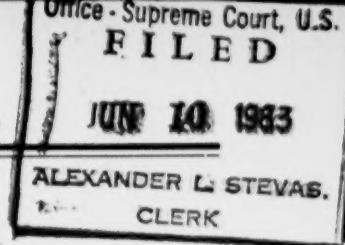


82-2037



No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1982

JOHN CASTANO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT JUDGE'S FINDING THAT THE PETITIONER'S CUSTODIAL STATEMENT WAS INVOLUNTARY AND NOT BASED UPON ANY WAIVER OF CONSTITUTIONAL RIGHTS VIOLATED THE PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS AND WAS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, JOHN CASTANO, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit rendered on April 13, 1983.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is attached as part of the Appendix. (App. 1-8). This decision is reflected at 696 F.2d 1006.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit. This judgment and opinion was entered on January 3, 1983 (App. 1-8), and rendered on April 13, 1983, by the denial of a timely petition for rehearing. (App. 9).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, which provide, in pertinent part, as follows:

FIFTH AMENDMENT

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

The petitioner was charged by indictment with conspiracy, possession with intent to distribute, and distribution of cocaine. During pretrial proceedings, an evidentiary hearing was held before United States Magistrate Patricia J. Kyle. That hearing revealed that the petitioner, a young man of Spanish origin, had suffered the first arrest of his life. While in his holding cell, he observed a codefendant in the cell across from his being beaten and kicked by DEA agents. The bleeding, battered codefendant kept urging the agents to provide water and medical attention. The codefendant also repeatedly begged, "No mas, no mas," a Spanish phrase of resignation meaning "no more, no more." This codefendant was ultimately removed to a hospital by ambulance. The magistrate noted that the petitioner became extremely fearful as a result of his observations.

Against this backdrop, the agents sought to question the petitioner. Prior to any questioning, the agents originally advised the petitioner of his rights to silence and counsel. The petitioner refused to waive his constitutional rights at that time. The petitioner was then briefly left alone in his cell until an agent returned and proffered a waiver-of-rights form, again seeking to obtain a relinquishment of those constitutional protections. Again, the petitioner refused to waive his rights, flatly declining to execute the DEA form. The agent remained in the holding cell and a conversation began concerning the petitioner's girlfriend and her legal innocence. During this conversation the agent told the petitioner that he should sign the waiver form and make a statement if he were really concerned with his girlfriend's fate. It is

this conversation which has formed the basis of the appeal below and the instant petition.

In the district court, the petitioner relied upon the magistrate's findings and successfully argued that his statements were not freely and voluntarily made and should be suppressed. (App. 10-11). District Judge Jose A. Gonzalez, Jr., noted that the government had failed to meet its heavy burden of proof in that regard, in part because the petitioner had repeatedly declined to consent to any waiver of his rights to counsel and to remain silent.

An appeal by the government from the suppression order to the United States Court of Appeals for the Eleventh Circuit resulted in a reversal (App. 1-8). In its unpublished opinion, the court held:

In the case before us, Castano was advised of his rights and indicated an understanding of them. Moreover, although he repeatedly refused to waive his rights and sign a written waiver form, Castano continued the conversation with Agent Belkair. During these conversations, Castano volunteered certain incriminating statements in the sense that they were not in response to any question by Agent Belkair. Rather, they were ostensibly made in an effort to exculpate his girlfriend and explain his own actions. Thus, we find that the totality of the circumstances indicates that Castano's statements were voluntarily and freely made.

(App. 8).

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT JUDGE'S FINDING THAT THE PETITIONER'S CUSTODIAL STATEMENT WAS INVOLUNTARY AND NOT BASED UPON ANY WAIVER OF CONSTITUTIONAL RIGHTS VIOLATED THE PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS AND WAS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

In its opinion, the Eleventh Circuit noted the petitioner's repeated refusals to waive his constitutional rights or to execute the waiver form. In so doing, the court properly relied upon this Court's holding in *North Carolina v. Butler*, 441 U.S. 369(1979), that waiver can be inferred from words or actions. The opinion noted:

Here no evidence of words or actions inferring waiver exist except Castano's statements. The pertinent question then becomes whether such statements were voluntary or spontaneous.

(App. 5).

A complete answer to this question is found in the Fifth Circuit's opinion in *McDonald v. Lucas*, 677 F.2d 518 (5th Cir. 1982). There, the court found, as here, both that there were no threats, promises, or physical violence upon the accused, and that some hostilities did attend McDonald's arrest and confinement. There, also as here, the court found that the defendant made a

statement following refusals to waive his rights in either an oral or a written form. The court's opinion, after reviewing this Court's decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966); and *North Carolina v. Butler*, *supra*, concluded:

The crucial question is not whether the lack of a signed waiver automatically precludes the admission of all further custodial statements. Rather, the crucial question is when can a waiver of rights be implied or inferred from the actions and words of the person interrogated. Here we go from the certainty of knowing that the lack of an express waiver does not determine actions and words are sufficient to imply a waiver of constitutional rights. That focuses our analysis on the other end of the rights' spectrum.

The waiver of federal constitutional guarantees is a matter of federal constitutional law. Henry v. Dees, 5 Cir. 1981, 658 F.2d 406, 409. A substantive right is only as good as the procedural protections afforded that right. The constitutions of many nations are wonderful showcases of stated rights. But what makes our constitution effective is that our procedural law gives our citizens the key to a storehouse of substantive rights. For example, in Miranda, the Supreme Court recognized that the principle that an individual may not be compelled to incriminate himself is worthless unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings. 384 U.S. at 458, 86 S.Ct. at 1619.

Waiver of constitutional rights is not to be lightly inferred. Years ago the Supreme Court announced the standard that ripened into *Miranda*: The burden is upon the state to demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 1938, 304 U.S. 458 at 464, 58 S.Ct. 1019 at 1023, 82 L.Ed. 1461.

677 F.2d at 520-21 (emphasis supplied).

In applying these principles to McDonald's case, the Fifth Circuit held:

A close review of the record fails to show a course of McDonald's conduct that would show a meaningful waiver of his constitutional rights. The argument put forth by the state and accepted by the district court focuses on the non-threatening actions of the sheriff, an absence of violence by the sheriff, and an understanding by the accused of his rights. The district court reached a conclusion which translates into this: If the accused understands his rights, is not threatened, is not physically harmed, and speaks, he is no longer entitled to his constitutional safeguards.

That is not the law. If it were, an accused party would waive his rights simply by answering questions during custodial interrogation.

It is the accused's conduct that must be examined. Here McDonald refused to sign a waiver. Then, the appropriate question is this: Are there any words spoken or actions taken by him to infer a waiver in spite of his refusal, to sign a written waiver? *In this case, there is no evidence of words or actions implying a waiver, except that statement made by McDonald which he now challenges. The state was required to demonstrate that McDonald said or did something constituting a waiver. This it did not do. Simply, the making of the inculpatory statement cannot alone indicate waiver. Otherwise, there could never be a question of whether a statement which an accused admittedly uttered was made without a valid waiver. See Miranda, 384 U.S. at 475, 86 S.Ct. at 1628.*

We hold that the state did not meet the heavy burden of showing that McDonald said or did something to indicate waiver.

Ibid (emphasis supplied).

In the opinion below, the Eleventh Circuit indicated an awareness of the *McDonald* decision and sought to avoid its impact by suggesting a distinction based on the sheriff's continued questioning of McDonald after his refusal to execute a waiver form. This distinction breaks down in light of the facts at bar and the non-literal meaning of "interrogation" in a *Miranda* context. In the instant case, the petitioner was initially advised of his rights to silence and counsel. In no manner did he waive those rights, but instead found them presented

again to him in a written incarnation by a DEA agent who entered his cell and urged the execution of the form for the benefit of petitioner's girlfriend. It is this persistence, this cumulation of circumstances, which constituted the functional equivalent of interrogation. As this Court found in *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980):

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attended to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition, focuses, primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of underlying intent of the police.

Given the circumstances discussed above, the petitioner's arrest, his viewing of the injuries of a codefendant, his repeated refusals to waive his rights and the tenacity of his captors in this regard, the petitioner was in a situation functionally equal to or more severe than, that confronting McDonald. The well-

reasoned opinion by the Fifth Circuit in that cause, relying on clear legal principles repeatedly established by this Court, clearly pointed the decisional path from which the Eleventh Circuit strayed.

Respectfully submitted,

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By: _____
KURT MARMAR

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IN THE UNITED CIRCUIT COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 81-6211
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOHN CASTANO,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

(January 3, 1983)

Before GODBOLD, Chief Judge, FAY and CLARK,
Circuit Judges.

PER CURIAM:

John Castano was indicted for conspiracy to possess with intent to distribute and to distribute cocaine, possession with intent to distribute cocaine, and distribution of cocaine. This appeal involves only the question of the propriety of the district court's order granting defendant's motion to suppress certain statements made by him following his arrest. We reverse.

Castano was riding as a passenger with his girlfriend¹ when they drove up to a Miami townhouse and parked. Juan Mora and an undercover government agent exited the townhouse, approached another parked vehicle, and consummated a cocaine sale with its owner. The owner of the second car, Osorio, then entered the car occupied by Castano and his girlfriend. The three drove away.

Shortly thereafter, the three occupants were arrested and Castano and Osorio were transported back to the townhouse.² Upon arriving, Castano observed Mora in handcuffs, bleeding from the head and face. (Apparently, Mora had been involved in an assault with the arresting officer.) Castano was then taken to the Drug Enforcement Administration (DEA) headquarters where he was placed in a holding cell.

While in the holding cell, Castano heard Mora begging for a doctor and a drink of water. Castano testified that he observed Mora apparently beaten and violated, sprawled out on the bench or floor, and bleeding profusely. Castano also testified that he saw three agents kick Mora and comment that his bleeding to death might not be a regretful consequence. As a result of what he felt to be problems with Mora, Castano allegedly became apprehensive and afraid.

¹Castano calls his girlfriend, Arango, his wife. Although they are not legally married, Arango is thought of by Castano as his wife.

²Castano's girlfriend was transported separately.

Agent Belkair removed Castano to another room where she advised defendant of his *Miranda* rights.³ He responded that he understood his rights but refused to waive them. Agent Belkair, however, testified that he was vacillating in regard to whether he wished to talk. Castano was then returned to the holding cell where he was given a waiver of rights form, which he read but refused to sign. Castano testified that upon being asked whether he understood his rights, he responded negatively. It was at this time⁴ that Castano made the statements in question.⁵

³The magistrate's findings of fact point out the many discrepancies and unclear sequence of events, one of which is whether the actual reading of the *Miranda* rights occurred before or after Castano's observations of Mora.

⁴The government is seeking to introduce only the first statement made by Castano even though further statements were allegedly made at later times.

⁵The testimony reveals a conflict as to what was actually said and by whom. Castano alleges that he asked Belkair several questions regarding his girlfriend's whereabouts and safety but received no answer. Castano further alleges that he simply stated that he was not involved in anything. According to Belkair, Castano offered inculpatory statements while reading the waiver of rights form. Belkair testified that Castano first stated that his girlfriend had nothing to do with this. When asked if he meant the cocaine, he responded that she knew nothing of drugs. Belkair then stated that as far as DEA was concerned, she was a direct participant in the cocaine delivery. Castano then stated that she only drove where he told her and that usually he had nothing to do with drugs but had done it for the money so that he could buy his girlfriend nice things.

The magistrate's findings of fact do not include a determination as to the actual substance of the statement. Rather, the magistrate stated that such a determination was within the province of the jury, and the only issue for the magistrate was whether the statement, whatever it was, should be suppressed.

Prior to defendant's trial, he moved to suppress the statements on the grounds that there existed no probable cause for his arrest, the statements were not freely and voluntarily made, and no evidence of compliance with *Miranda* was shown. A suppression hearing was held before a magistrate who recommended denying defendant's motion to suppress. The magistrate stated in her findings of fact that defendant's statements were spontaneous in the sense that they were not pursuant to any question, threat or coercion of any kind.

Castano petitioned for a review of the magistrate's ruling, and the district court adopted the magistrate's findings of fact. The district court adopted the magistrate's conclusions of law in regard to the finding of probable cause for arrest but overruled the conclusion with respect to the statements made by defendant after his arrest. The district court's order stated:

This court finds that there is insufficient evidence upon which to conclude that such statements were made freely and voluntarily and, therefore, they should be suppressed. The record reflects that the Defendant Castano repeatedly failed to consent to any waiver of his rights. Transcript at pages 14, 16 & 17-18. Based upon the totality of circumstances highlighted by the record the court finds that the government has failed to carry its burden of establishing that Castano freely, voluntarily and intelligently waived his Fifth Amendment right to remain silent.

Vol. I Record 56-57.

"[F]indings of fact by the district court on a motion to suppress should not be disturbed on appeal unless clearly erroneous. The ultimate issue of voluntariness, however, is an issue of law, and the appellate court must make an independent determination." *United States v. Kreczmer*, 636 F.2d 108, 110 (5th Cir. Unit B 1981) (citations omitted).

Two possible bases exist for denying admissibility of the statements presented in this factual setting. If Castano's statements were the product of physical or psychological coercion such that his will was overborne, then the statements are inadmissible as not freely and voluntarily given. Further, if Castano had not waived his right to remain silent or volunteered any information, the statements are also inadmissible as not freely, voluntarily, and intelligently given.

The appellate court is to review the facts and determine from the totality of the circumstances whether any statements are so suspect that to admit them into evidence would deny defendant due process of law. *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709 (1981). The magistrate found the record void of any coercion, physical harm, or threat thereof. The magistrate stated that Agent Belkair acted in a professional manner and did not ask a question or pose a threat aimed at eliciting a statement from Castano.⁶

⁶The magistrate stated:

The statement, whether you take it as from Mr. Castano's testimony or from Agent Belkair's testimony, was spontaneous in the sense that it was not pursuant to any question, any threat, any coercion of any kind by Agent

Since the district court adopted the magistrate's findings of fact, the district court could not have based its decision of involuntariness on the cases dealing with psychological coercion and intimidation. We agree that Castano's statement was not the product of coercion. See, e.g., *Jurek v. Estelle*.

In overturning the magistrate, therefore, the district court must have relied on the facts dealing with Castano's refusal to waive his rights or sign the waiver form. This portion of the district court's reasoning we find contrary to established law.

The inquiry is whether Castano waived his right to remain silent or otherwise made a voluntary or spontaneous statement. It is apparent that Castano refused to waive his rights or sign a waiver form. However, waiver can be inferred from words or actions. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Here, no evidence of words or actions inferring waiver exist except Castano's statements. The pertinent question then becomes whether such statements were voluntary or spontaneous.⁷

(Footnote 6 Continued)

Belkair; that in all events, Agent Belkair acted in the best conceivable and most professional manner toward Mr. Castano, and that comes from his testimony as well as the court's credibility determinations as to Agent Belkair's testimony.

⁷The court is aware of the present Fifth Circuit's opinion in *McDonald v. Lucas*, 677 F.2d 518 (5th Cir. 1982), which held that where there is no evidence of words or actions implying a waiver except the challenged statement, the mere making of an inculpatory

In *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919, 98 S.Ct. 3046, 37 L.Ed.2d 1041 (1973), defendant was stopped by the border patrol at a permanent checkpoint and found to be carrying four large burlap bags alleged by defendant to contain alfalfa but in fact containing marijuana. Defendant was advised of his *Miranda* rights which he indicated that he understood but declined to sign the waiver form. Conversations between the agent and defendant continued, however, with the result that defendant made incriminating statements indicating that he knew the substance was marijuana. These statements were not made in response to any question by the agent that sought to elicit any information regarding the contents of the sacks.⁸ Defendant was then taken into border patrol headquarters where he was readvised of his rights. Defendant again stated that he understood them but refused to sign the written waiver. Defendant again acted in such a manner as to

(Footnote 7 Continued)

statement cannot alone indicate waiver. The court reached this conclusion where the accused understood his rights and was not threatened or physically harmed. However, in *McDonald*, the sheriff continued to question the defendant and ultimately elicited the statement in issue after *Miranda* warnings were given and the defendant had refused to sign the waiver form.

⁸The first agent asked McDaniel whether the substance in the car's trunk had been declared at the bridge, although he did not specifically refer to the substance as marijuana. McDaniel responded that he had not declared it and then volunteered that "the marijuana had been brought across up river." 463 F.2d at 135.

be probative of his knowledge that the substance was marijuana.⁹

The court concluded that McDaniel was advised of and understood his constitutional rights and that the statements in question were voluntarily made. The court reasoned that since *Miranda* warnings were twice given, McDaniel acknowledged his comprehension of those rights both times, and the incriminating statements were not made in a response to any question soliciting information regarding the bags' contents, McDaniel's only argument was that refusal to sign a waiver form is "grounds for excluding any conversation subsequent to the proffer and refusal of the written waiver." *Id.* at 135. Rejecting that proposition, the Fifth Circuit stated:

A refusal to sign a waiver may indicate nothing more than a reluctance to put pen to paper under the circumstances of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons, including a desire to exculpate or explain himself. Put another way, a detainee may make statements that are quite voluntary without signing a written waiver. A court must look to all the circumstances of the detention to ascertain

⁹The second agent asked McDaniel if he would consider "cooperating and delivering this to the ultimate destination," again without referring to the contents in the car's trunk as marijuana. McDaniel asked some questions about the cooperation and then asked to discuss it with his rider. After the discussion, McDaniel refused to continue to transport the trunk's contents. *United States v. McDaniel*, 463 F.2d at 135.

whether or not the refusal to sign a waiver was tantamount to a refusal to discuss . . .

Id. See also Eleuterio v. Wainwright, 587 F.2d 194 (5th Cir.), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979).

In the case before us, Castano was advised of his rights and indicated an understanding of them. Moreover, although he repeatedly refused to waive his rights and sign a written waiver form, Castano continued the conversation with Agent Belkair. During these conversations, Castano volunteered certain incriminating statements in the sense that they were not in response to any question by Agent Belkair. Rather, they were ostensibly made in an effort to exculpate his girlfriend and explain his own actions. Thus, we find that the totality of the circumstances indicates that Castano's statements were voluntarily and freely made.

For the foregoing reasons, we disagree with the district court that defendant's motion to suppress should have been granted. The motion to suppress was properly denied by the magistrate. Accordingly, we REVERSE.

[Filed Apr. 13, 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6211

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOHN CASTANO,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(April 13, 1983)

Before GODBOLD, Chief Judge, FAY and CLARK,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause be and
the same is hereby denied.

ENTERED FOR THE COURT:

[Illegible]

United States Circuit Judge

[FILED NOV. 30, 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-152-CR-JAG

UNITED STATES OF AMERICA,
Plaintiff,
vs.
LUIS CARLOS ESCOBAR, et al.,
Defendants.

ORDER

THIS CAUSE is before the Court upon the Defendant, John Elkin Castano's, Petition for Review of the Magistrate's Ruling Denying his Motion to Suppress Statements, and the Magistrate's recommendation that there was probable cause to arrest the Defendant Castano.

The Court has independently considered the record, the transcript of hearing on the Motion to Suppress, the Magistrate's Findings of Fact and Conclusions of Law, and being otherwise duly advised, it is ORDERED AND ADJUDGED as follows:

1) That this court adopts the Findings of Fact issued by the Magistrate on July 17, 1981.

2) That this court adopts the Conclusions of Law of the Magistrate as regards that portion of the conclusions which find that there was probable cause to arrest the Defendant, John Elkin Castano. Mr. Castano's physical

presence in the Nova automobile which pulled up in front of Mr. Mora's townhouse together with his other activities during the alleged cocaine transaction as observed by the D.E.A. undercover agents fully support the Magistrate's conclusion that there was probable cause to arrest the Defendant Castano.

3) That this Court OVERRULES the Magistrate's Conclusion with respect to the statements made by the Defendant, John Elkin Castano, after his arrest. This court finds that there is insufficient evidence upon which to conclude that such statements were made freely and voluntarily and, therefore, they should be suppressed. The record reflects that the Defendant Castano repeatedly failed to consent to any waiver of his rights. Transcript at pages 14, 16 & 17-18. Based upon the totality of circumstances highlighted by the record the court finds that the government has failed to carry its burden of establishing that Castano freely, voluntarily and intelligently waived his Fifth Amendment right to remain silent.

DONE AND ORDERED in Chambers at the United States District Courthouse, Fort Lauderdale, Florida, this 30th day of November, 1981.

Jose A. Gonzalez Jr.
U.S. DISTRICT JUDGE

Copies furnished counsel